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No. 15-338

In the Supreme Court of the United States

MARK J. SHERIFF; SARAH SHERIFF; WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA; and MICHAEL DEWINE; Attorney General of Ohio,

Petitioners,

–v–

PAMELA GILLIE and HAZEL MEADOWS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MERITS BRIEF OF RESPONDENTS ERIC JONES AND THE LAW OFFICE OF ERIC A. JONES, LLC IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Respondents in Support of Petitioners here are Eric A. Jones and the Law Office of Eric A. Jones, LLC, who were hired by the state of Ohio as special counsel to collect sovereign debts, along with Petitioners Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner, Co., LPA. They were co-defendants in the district court (S.D. Ohio, Case No. 2:13-cv-212) and were Appellees in the Sixth Circuit Appeal (6th Cir., Case No. 14-3836). Respondents Eric A. Jones and the Law Office of Eric A. Jones, LLC have also filed a petition for writ of certiorari with docket number 15-620. Ohio Attorney General Mike DeWine (also a petitioner here) successfully moved to intervene in the District Court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit. Respondents opposed to Petitioners are Pamela Gillie and Hazel Meadows, who sued Eric A. Jones and the Law Office of Eric A. Jones for using the letterhead provided by the Ohio Attorney General for the purpose of collecting sovereign debt.

Defendants-Appellees below (and Petitioners here) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA.

Ohio Attorney General Michael DeWine (also a Petitioner here) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Respondents in Support of Petitioners hereby submit the following corporate disclosure statement:

Respondent in Support of Petitioners the Law Office of Eric A. Jones, LLC has no parent company, and no publicly held company owns 10% or more of it.

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OPINIONS BELOW

The Decision for the United States Court of Appeals for the Sixth Circuit is reported as *Pamela Gillie, et al. v. Law Office of Eric Jones, LLC., et al.* 785 F.3d 1091 (6th Cir. 2015), and copies of the order denying rehearing *en banc* and the Decision are reprinted in the Appendix to the Ohio Attorney General's Petition for Certiorari at 1a and 18a, respectively. The decision of the United States District Court for the Southern District of Ohio is reported as *Pamela Gillie et al. v. Law Office of Eric Jones, LLC., et al.* 37 F.Supp.3d 928, (S.D. Ohio 2014) and is reproduced at OAG Pet.App.77a.

JURISDICTION

The Court of Appeals entered its judgment on May 8, 2015 and subsequently denied a Petition for re-hearing *en banc* on July 14, 2015. The Law Office of Eric A. Jones, LLC and Eric Jones timely filed a petition for writ of certiorari on October 7, 2015 in a separate but related appeal, Supreme Court Case No. 15-620. This Court granted certiorari in this case on December 11, 2015. Because the Law Office of Eric A. Jones, LLC and Eric Jones were both parties before the court of appeals, the Law Office of Eric A. Jones, LLC. and Eric Jones are properly deemed parties entitled to file documents pursuant to Supreme Court Rules 12.6 and 28.4. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 15 U.S.C. § 1692a(6) provides, in pertinent part:

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f (6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
>
> * * *
>
> (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

- **15 U.S.C. § 1692e(9) and (14)** provide, in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
>
> * * *
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

STATEMENT

The key issues in this case revolve around the scope of the exemption for state "officers and employees" found in 15 U.S.C. § 1692a(6)(C) of the Fair Debt Collection Practices Act (the "FDCPA") as well as the framework for assessing whether a debt collection communication qualifies as "false, deceptive, or misleading" under 15 U.S.C. § 1692e.

Respondents Eric Jones and the Law Office of Eric A. Jones, LLC (collectively the "Jones Respondents")

concur in Petitioner's statement of this case and provide this additional brief in support of Petitioners. Respondent Eric Jones was appointed "special counsel" to the OAG pursuant to Ohio Revised Code (O.R.C.) § 109.08, which states in pertinent part:

> The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

See O.R.C. § 109.08.

Under the auspices of this appointment, Mr. Jones sent Respondent Pamela Gillie ("Gillie") a letter dated May 24, 2012, seeking recovery of an Ohio State University Medical Center bill. The letter was signed by Mr. Jones as "outside counsel" of the OAG and was written on letterhead of the OAG as required by the OAG. The letter further instructed Gillie to forward payment to the Law Office of Eric A. Jones, LLC (hereinafter "Jones LLC"). *See* OAG Pet.App.14a. Petitioner Mark Sheriff ("Mark Sheriff"), as special counsel for the OAG, sent a similar letter to Respondent Hazel Meadows ("Meadows") on July 20, 2012, seeking recovery of a University of Akron tuition debt. *See* OAG Pet.App.17a. Both beneficiaries, Ohio State University Medical Center and University of Akron, are state entities. At no time did Mr. Jones use the Attorney General's letterhead to collect private debt.

The practice of using special counsel to collect State debts is not a new one, nor is it one that is used

exclusively by the State of Ohio.[1] Attorneys General in the State of Ohio have been using this statutory practice for years, specifically relying upon "special" counsel since the office of the Ohio Attorney General (the "OAG") was created in 1846. *See* 44 Ohio Laws 45, 46 (1846). The particular statute that authorizes the practice (O.R.C. § 109.08) has existed in its current form since 1990. *See* 1989 S 147, effective 1-1-90. Former OAG Richard Cordray used this practice during his tenure, as evidenced by his 2009 annual report.[2] Former Attorney General Jim Petro also used this practice. *See Cleveland State Univ. v. Mills*, No. 2007-01517, Pet. for Removal, Exh. (Ohio Ct. Cls. Jan. 19, 2007)

On March 5, 2013, Plaintiff-Respondents sued Petitioners in the United States District Court for the Southern District of Ohio, Eastern Division, asserting that the Petitioners' and Jones Respondents' use of the OAG's letterhead in these letters violated multiple subsections of 15 U.S.C. § 1692e, including

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[1] The following states also use a similar practice according to their respective state laws: Alabama (Code of Alabama § 36-15-9); Arizona (A.R.S. § 41-2513(B)); Arkansas (Arkansas Code § 25-16-702); California (Cal. Rev. & Tax Code § 19376(b)); Florida (Florida Statutes § 16.015); Georgia (O.C.G.A. § 45-15-12); Indiana (Ind. Code § 4-6-5-3); Iowa (Iowa Code § 13.7); Louisiana (R.S. § 42:262); Mississippi (MS Code § 7-5-7); North Carolina (N.C. Gen. Stat. § 147-17(a)); Texas (Texas Government Code § 402.0212); Virginia (Code of Virginia §§ 2.2-507 and 510); West Virginia (W Va. Code § 6B-1-3(d)); Wisconsin (Wis. Stat. § 14.11(2)(b)).

[2] *See* Ohio Attorney General Annual Report, p.12, retrieved from http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/00/00ab2712-fb34-4dca-b010-2796579b17dd.pdf.

sections 1692e(1), 1692e(9), 1692e(10), and 1692e(14). *See* J.A.35. On December 4, 2013, the District Court ordered the bifurcation of the issues in this case and ordered the parties to submit dispositive motions on the issue of Petitioners' liability. *See* Order, Doc.42, Page ID# 480-484. Plaintiff-Respondents filed Motions for Summary Judgment with supporting documents and affidavits. *See* MSJs, Docs. 48, 49, and 50; Page ID# 570- 890. Petitioner Mark Sheriff and the Jones Respondents also filed Motions for Summary Judgment with supporting documents and affidavits *See* MSJs, Doc.47, Page ID# 522-538 & Doc.51, Page ID# 891-912. All parties filed appropriate responsive and reply briefs.

The District Court granted the Petitioner Mark Sheriff's and the Jones Respondents' motions for summary judgment, finding that (1) special counsel were "officer[s] or employee[s]" of the State of Ohio pursuant to 15 U.S.C. § 1692a(6) (C) and, therefore, not "debt collectors"; and (2) even assuming, *arguendo*, that special counsel were debt collectors, Petitioner Mark Sheriff and the Jones Respondents did not violate the FDCPA. *See* Opinion and Order, Doc.72; Page ID# 1229-1248. The Plaintiff-Respondents' appeal ensued.

On appeal, the Sixth Circuit Court of Appeals reversed, concluding that the District Court had interpreted the FDCPA's "officer" exemption too broadly. Specifically, it reasoned:

> The issue before us is controlled by the scope of the term "officer." Specifically, we must determine whether private attorneys "appointed" as "special counsel" to the Ohio

> Attorney General, but operating as independent contractors, are officers of a state, within the meaning of the FDCPA. We think not. The use of the word "appoint" in reference to "hiring" independent contractors is not decisive. Special counsel, in truth, are indistinguishable from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office. The FDCPA is a broad remedial statute, *Frey v. Gangwish*, 970 F.2d 1516, 1520 (1992), with limited, clearly defined exceptions. We find no justification for diluting its protection by broadly interpreting the term "officer or employee" to include independent contractors.

See OAG Pet.App.29a. As discussed below, the Sixth Circuit's majority Opinion missed the mark.

In his well-reasoned dissent, Judge Sutton recognized "two serious flaws" in the FDCPA claims. *See* OAG Pet.App.55a.

> One is that the Act exempts state "officers" from its coverage. Under the Dictionary Act and the clear-statement rule established by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the deputizing of private lawyers to act as assistant attorneys general makes them "officers" of the State for these collection purposes. Any other interpretation would mean that Congress meant to micromanage how a State structured its law enforcement

> and debt-collection efforts and would create grave constitutional concerns along the way.

Id. at 55a-56a. The dissent continued, stating:

> The other flaw is that the special counsels' use of the Ohio Attorney General's stationery and the accurate description of their relationship with the State are not "false and misleading" under the statute. The stationery, which the Attorney General requires each special counsel to use, accurately describes the relevant legal realities—that the law firm acts as an agent of the Attorney General and stands in the shoes of the Attorney General in collecting money owed to the State.

Id. at 56a.

As a result, the Court of Appeals received two petitions for a re-hearing *en banc*; one from the OAG and the Petitioners and the other from the Jones Respondents. The issues that are now on appeal were denied a re-hearing *en banc*, but the petitions did garner a split among the circuit court judges. The denial of *en banc* re-hearing also garnered a dissenting opinion from Judge Sutton, one that was joined by five circuit court judges. *See* OAG Pet.App.7a. Sutton's dissent pointed to four distinct problems with the majority opinion: 1) there is nothing misleading about special counsel's use of the OAG letterhead, as it accurately reflects the principal-agent relationship between special counsel and the OAG; 2) if the use of stationery that accurately reflects the principal-agent relationship is misleading, special counsel will then be forced to use their own

letterhead and assume the risk "that recipients will assume that the letter does not concern a state debt" (*i.e.*, complying with the 6th Circuit majority opinion could lead to confusion in the minds of debtors); 3) the "officer" exemption either applies to special counsel as agents of the OAG or the definition of an "officer" under the FDCPA is ambiguous (as conceded by the plaintiffs), and the clear-statement mandate of *Gregory* requires that the FDCPA is interpreted in a way that does not interfere with the States' debt collection practices; and 4) the Respondents' have "feigned confusion" about whether the letters at issue came from the OAG, but when it came time to interpret the word "officer" found it "quite evident that the letters did not come from the State." *See* OAG Pet.App.7a-11a.

On July 21, 2015, the Petitioners filed their Motion to Stay the Mandate pending resolution of the petition for writ of certiorari and thereafter until this Court disposes of the case. On July 22, 2015, the motion was granted. *See* Order, Doc.77; Page ID# 1293.

On September 15, 2015, the Petitioners filed their petition for a writ of certiorari. This petition was granted on December 11, 2015.

SUMMARY OF ARGUMENT

15 U.S.C. § 1692a(6)(C) excludes from the FDCPA's regulation "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance

of his official duties." Special counsel are officers, appointed by the State. They should be permitted to comply with the State's requirements without fear of liability. The Sixth Circuit's decision directly conflicts with this Court's case law and an analogous circuit level case.

The only analogous circuit-level case to reach this question, *Heredia v. Green*, found that the officer, appointed pursuant to state statute, removable by an authority of the State, and who acted pursuant to orders and instructions of the State, is an Officer of the State and excluded from the regulation of the FDCPA. *See Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). The Sixth Circuit's decision in this case is in direct opposition to *Heredia*.

This Court has long respected and defined the boundaries of federalism. The clear statement rule, enunciated in *Gregory v. Ashcroft*, requires that a court be "absolutely certain that Congress intended such an exercise" before "displacing weight of federal law to mere congressional *ambiguity." See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). Use of the clear statement rule has not been relegated to any one area, but instead has been called upon by this Court in regards to a myriad of federal laws. See, *e.g.*, *Gregory* at 460-61 (employment laws); *Kelly v. Robinson*, 479 U.S. 36, 49-53 (1986) (bankruptcy laws); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981) (spending grants); *United States v. Bass*, 404 U.S. 336, 349-51(1971) (criminal prohibitions).

The clear statement rule is applicable here. Congress did not intend for the FDCPA to regulate

the collection of a debt owed to a State. The FDCPA illustrates Congressional respect for the bounds of federalism by including an exemption for state "officers" or "employees" who are collecting debt within the bounds of their "official duties." *See* 15 U.S.C. § 1692a(6)(C). The failure to employ the clear statement rule in this case tramples on the sovereign ability of a State to structure its own government, as it relates to the collection of State debts.

Additionally, the Plaintiff-Respondents have attempted to attach liability to the law firms for which special counsel work. But this theory of liability cannot stand where both the principal and agent are not subject to liability. *Freeman v. ABC Legal Services, Inc.*, 827 F.Supp.2d 1065, 1076 (N.D. Cal. 2011) (emphasis added), *citing Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 108 (6th Cir. 1996); *see also Breidenbach v. Experian*, No. 3:12-cv-1548-GPC-BLM, 2013 WL 1010565, *3 (S.D. Cal. Mar. 13, 2013). Here, Eric Jones is not a debt collector and the Law Office of Eric A. Jones, LLC cannot be held vicariously liable under the FDCPA.

Secondly, this case looks at the general standard that applies to a debt collector's communications. This case asks whether special counsel's use of the OAG letterhead was misleading. To be clear, the 6th Circuit reviewed this question under one of the applicable standards,[3] the "least sophisticated consumer" standard. This decision improperly condemns special counsel to liability for telling the

[3] There is currently a split among the circuits regarding the proper general standard for what is "false" or "misleading." This is discussed more fully below.

truth: that he was working as "outside counsel for the Attorney General's Office." *See* OAG Pet.App.14a. The letters provided special counsel's correct contact information. *See Id.* The Plaintiff-Respondents and the 6th Circuit call for special counsel to clear up the "misleading" nature of the communications, by omitting truthful and relevant information (*i.e.* removing the OAG letterhead and reference to the special counsel's association with the OAG). But this course of action would actually mislead because it would fail to identify the real party in interest. Plaintiffs-Respondents failed to provide a remedy that does not deprive debtor of important information.

Specifically, the subject letters allegedly violated 15 U.S.C. § 1692e(9) because they "simulate" or "falsely represent" their "source, authorization, or approval." *See* 15 U.S.C. § 1692e(9). The Jones Respondents admit that the use of the OAG's letterhead creates the impression that th letters are sent under the authority of the OAG. That is not a simulation or false representation because these letters were sent under the authority and will of the OAG. Plaintiffs-Respondents do no claim that special counsel exceeded the scope of their authority under state law. Indeed, the OAG (as Ohio's chief law enforcement officer) has involved himself in this case specifically to support the position that special counsel did not exceed the scope of their authority under Ohio law.

The letters also allegedly violated 15 U.S.C. § 1692e(14) because the names used in the letters are not the "true name" of special counsel. Nothing in that section of the FDCPA prohibits the expressly

authorized use of OAG letterhead. In fact, the use of multiple true names is consistent with the FDCPA so long as that name "does not misrepresent his identity or deceive the consumer." *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988). As an agent of the OAG, special counsel are required by the OAG to use the OAG's letterhead in correspondence with debtors. Accordingly, even if the FDCPA regulated a state's appointed special counsel, there were no violations of the FDCPA in thi case.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION CREATES AN ANOMALY, WITH THE OAG REQUIRING SPECIAL COUNSEL TO USE OAG LETTERHEAD IN POSSIBLE VIOLATION OF FEDERAL LAW

If the Sixth Circuit's Decision is not reversed, Special Counsel who were required to use the OAG letterhead, will be forced to stand trial with a jury to decide whether they violated the FDCPA for simply telling the truth.

The only analogous circuit-level case to reach this question, *Heredia v. Green*, got it right. *Heredia v. Green*, 667 F.2d 392, 394-95 (3d Cir. 1981). *Heredia* properly found that the defendant was an "officer" under 15 U.S.C. 1692a(6)(C). *Heredia* looked at the duties of a Landlord and Tenant Officer under Pennsylvania law, where "each Court may appoint and fix the compensation and duties of necessary

administrative staff " *See* 42 Pa.C.S.A. § 2301(a)(2). Pennsylvania law further provided that "the President Judge of a court shall promulgate all administrative rules and regulations " 42 Pa. C.S.A. § 325(e)(1).

The Defendant, Green, was appointed by the Municipal Court President Judge in accordance with § 2301, and was to "be removed from his position by the President Judge." *See Heredia* at 395. In that position, Green received information from each landlord regarding delinquent tenant and the amount of rent and late charges claimed. *Id.* at 393. He would then create collection notices and serve copies to the tenants. *Id.* The court found that Green was entitled to the "officer" exemption in § 1692a(6)(C) as a court appointed "Landlord and Tenant Officer" when he sent notices to tenants demanding rent, at the request of a municipal court judge. *Heredia* at 393.

In a concurring opinion, one judge concluded that it would be "anomalous" to expose this officer to "monetary liability for deceptively giving the impression that he was acting as an officer of the court despite the fact that his actions had indeed been authorized by that court." *See Heredia* at 396. Likewise here, special counsel collected debts owed to the State of Ohio, where the officer in *Heredia* was simply collecting private debts at the behest of the State. *See Id.* Consequently, special counsel in this case are even more within the definition of the term "officer," as they were collecting debts specifically owed to the State of Ohio. As was pointed out in the concurring opinion in *Heredia*, without the protection of the "officer" exemption in the FDCPA, any party

performing the required responsibilities of special counsel will potentially be left holding the bag.

The Sixth Circuit opinion mistakenly reasoned that "the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts." *See* OAG Pet.App.21a. But such a distinction fails the Sixth Circuit's own test for several reasons. In *Heredia*, the law itself did not authorize the officers to send collection notices, it was the judge who did so. *Heredia*, 667 F.2d at 395. Likewise, here the OAG is authorized to appoint special counsel to collect State debts. *See* O.R.C. 109.08. Furthermore, the statute in *Heredia* did not actually grant the officers collection duties, instead it stated "the President Judge of a court shall promulgate all administrative rules and regulations." *See Heredia* at 395. Here, the Ohio statute specifically provides special counsel with the collection powers of the State and details the use of the OAG's letterhead in connection with the collection of such claims. *See* O.R.C. 109.08. Finally, the Court's opinion fails to recognize the Supreme Court of Ohio's decision in *Solowitch v. Bennett* finding that an independent contractor can also be an officer of the State. *See Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982). In fact, in *Solowitch*, the State of Ohio recognized the Deputy Registrar of the Bureau of Motor Vehicles as both an independent contractor and an officer of the State. *See Id.*

The exemption under § 1692a(6)(C) is broad enough that it encompasses both "officers" and "employees," with the implication that some officers

of a state will not be employees. *See* 15 U.S.C. § 1692a(6)(C). This is that situation. Special counsel are paid as independent contractors of the State of Ohio (albeit ones with the power to enforce civil code on behalf of the State), but are nonetheless "officers" of the State. This understanding of the exemption is narrow enough to recognize that some "officers" or "employees" of a state could have debt collecting duties that are not "in the performance of his official duties." *See Id.* Here, many special counsel may also collect debts as private attorneys for private clients. In that situation, special counsel could not use the OAG letterhead. But when special counsel act within their appointment to collect State debts, they should be permitted to comply with the State's requirement to use the OAG's letterhead. Here, special counsel meet the definition of "officer" of the State of Ohio and should be exempt from the FDCPA.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CLEAR STATEMENT CASES

The clear-statement rule was first articulated as such in *Gregory v. Ashcroft* and has since become a mainstay of this Court's cases. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The *Gregory* Court found that before a court "upset[s] the usual constitutional balance of federal and state powers, Congress must make its intention to do so 'unmistakably clear in the language of the statute.'" *See Id.* at 453. It has since been invoked to determine the application and scope of numerous areas of federal law. See, *e.g.*, *Gregory* at 460-61 (employment laws); *Kelly v. Robinson*, 479 U.S. 36, 49-53 (1986) (bankruptcy laws); *Pennhurst State Sch. and Hosp.*

v. Halderman, 451 U.S. 1, 16-18 (1981) (spending grants); *United States v. Bass*, 404 U.S. 336, 349-51 (1971) (criminal prohibitions).

The clear-statement rule prohibits the application of a federal statute, which purports to regulate a core state function, unless Congress does so unambiguously. First, under the applicable definition of the term "officer," the FDCPA does not apply to special counsel. If nothing else, the definition of the term "officer" is at least ambiguous. For these reasons, the failure to apply the clear-statement rule trenches on a state's ability to arrange the conduct of its own government. Once the clear-statement rule has been applied (and Eric Jones is found to be an "officer"), Jones LLC cannot be held vicariously liable under the FDCPA.

A. The Fair Debt Collection Practices Act Does Not Apply to Special Counsel

The FDCPA prohibits "debt collectors" from using a "false, deceptive, or misleading representation or means in connection with the collection of any debt." *See* 15 U.S.C. § 1692e. The FDCPA also includes an exemption for "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *See* 15 U.S.C. § 1692a(6) (C). As the FDCPA does not define the term "officer," the Dictionary Act provides the proper federal definition. It defines an "officer" as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Special counsel fall directly within this definition. The 6th Circuit parsed the phrases

"authorized by law" and "the duties of the office," and in doing so, lost its way.

To "authorize" something is simply "[t]o give legal authority," "to empower" or "to sanction." *Black's Law Dictionary*, (10th ed. 2014). Ohio Rev. Code § 109.08 does exactly that. It empowers the OAG to "appoint special counsel to represent the state." *See* Ohio Rev. Code § 109.08. Without this statute, the OAG would not have the power or legal authority to hire or appoint private attorneys to do such work on behalf of the State. *See Id.* The 6th Circuit was too concerned with the independent contractor relationship. Independent contractor vs. employee is a distinction without a difference because the empowerment and authority to act are the same. It is clear that special counsel are "officers."

Specifically, the 6th Circuit Opinion voiced concern with the fact that the particulars of the OAG's relationship with special counsel are also governed by a Retention Agreement, but this is a distinction without a difference. Of course there is a vehicle by which the OAG selects and governs the private attorneys that will represent his office and the State itself, but this does not change the fact that § 109.08 is the power by which the OAG can "authorize" those agreements in the first place. Additionally, this is yet another parallel between this case and *Heredia*, where the state court judge in *Heredia* was required to promulgate rules and regulations that would govern the relationship of the court and the officer as well. *See Heredia* at 395.

Turning to the phrase "the duties of the office," an "office" can be defined as a "position whose occupant

has legal authority to exercise a government's sovereign power for a fixed period." *Black's Law Dictionary*, (10th ed. 2014). Here, special counsel are appointed to statutorily created positions to exercise government power for one-year renewable periods. *See* OAG Pet.App.57a. Additionally, special counsel have the power to enforce Ohio's civil code as it relates to debts owed to the State. The power to create and enforce the civil code is a quintessential function of the State. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Pico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994). It is this empowerment and authority to act that distinguishes special counsel from other independent contractors working for the State. As the 6th Circuit dissenting opinion noted:

> The Ohio Facilities Construction Commission, cited by the majority in support of plaintiffs' view, proves the point: There is nothing "sovereign" about the power to "construct[] and repair" a state agency's buildings, Ohio Rev. Code § 123.21, and sovereign power remains a precondition of officer status.

See OAG Pet.App.62a.

Here, special counsel are appointed by the OAG (with legal authority), to statutorily created positions, for one-year periods of time. *See* OAG Pet.App.57a. The 6th Circuit created a fiction by requiring that special counsel carry out <u>all</u> of "the" duties of the office of the OAG. *See* OAG Pet.App.35a. The office or position defined here is not the office of the OAG, but rather the office of special counsel that is created

by law. *See* Ohio Rev. Code § 109.08. Special Counsel are appointed to handle specific duties of the OAG. Within those specific duties, special counsel are carrying out "the" duties for which they are appointed.

Finally, the State of Ohio defines the term officer in the same way as the Dictionary Act. The Supreme Court of Ohio has found that "[T]he chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law." *Engel v. Univ. of Toledo Coll. of Med.*, 957 N.E.2d 764, 768 (Ohio 2011). So, the idea that a party may be an independent contractor does not exclude him from also being an officer of the State. *See Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982). In fact, in *Solowitch*, the State of Ohio recognized the Deputy Registrar of the Bureau of Motor Vehicles as both an independent contractor and an officer of the state. *Id.* Here, special counsel meets the definition of an "officer" of the State of Ohio and should be exempt from the FDCPA.

Despite this, the 6th Circuit found that "[t]he overwhelming weight of authority sensibly finds that independent contractors are not exempt from FDCPA coverage as officers or employees pursuant to 15 U.S.C. § 1692a(6)(C)." In support of this finding, the 6th Circuit cites to *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996), where the question before the Court was whether USA Funds, a private, non-profit organization was exempt as an "officer or employee of the United States." *See Brannan, supra. Brannan* found that

USA Funds was not exempt, but only because there was no exemption for private, non-profit entities. Specifically absent from the opinion in *Brannan* is any holding that would help define an "officer of any State," which is the relevant question here.

The 6th Circuit also cited to another series of cases supposedly in support of the proposition that an entity in contract with the state is not exempt as "officers" or "employees" of the state. *See* OAG Pet.App.37a. Notably, the Jones Respondents are not asking this Court to define any entity as an officer of the state, but rather that the natural persons appointed as special counsel should be considered officers of the state.

The 6th Circuit cases are distinguishable as follows. In *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d. Cir. 2000), a municipal government sold its debt to a debt collector, precluding a finding that the third party debt collector was an "officer" or "employee" of the state. *See Pollice* at 389. Likewise, in *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 688 (E.D. Pa. 2003), the court merely cited to the *Pollice* case for the proposition that the "government employee exemption 'does not extend to those who are merely in a contractual relationship with the government.'" *See Piper* at 688 quoting *Pollice* at 406. Finally in *Gradisher v. Check Enforcement Unit, Inc.*, 133 F.Supp.2d 988 (W.D. Mich. 2001), the court found that a private entity that is in contract with the government, cannot be considered an "officer."

Those cases do not apply here for several reasons. Special counsel are specifically appointed in accordance with Ohio law. *See* O.R.C. § 109.08.

Furthermore, such a relationship is "personal in nature and does not extend to any law firm that the Special Counsel is associated with." *See* J.A.171. The *Pollice* case does not apply because the court in that case was analyzing a debt that was no longer owned by a government entity, but had in fact been sold, where here special counsel are collecting debts owned by the State. The *Piper* case is inapplicable because special counsel are not "merely" in a contractual relationship with the government: special counsel are appointed pursuant to statute, and the relationship between special counsel and the OAG is further clarified by means of the Retention Agreement. Furthermore, the holding in *Piper* was only in regards to an entity (a law firm), while the relationship between special counsel and the OAG is "personal in nature." *See* J.A.171.

The *Gradisher* case is inapplicable for the same reason. The court found that CEU, a private entity in a contractual relationship with the government, was unable to be considered as a "government agenc[y] or employee." [4] *See Gradisher, supra* at 992. Noticeably absent from this analysis is whether a person (appointed under state law) that is in contract with the state government can be considered an officer.

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[4] It should be noted that the discussion about the liability of an entity under the FDCPA is very intertwined with the argument regarding the vicarious liability of an entity if the principal of that entity is exempt from FDCPA liability. This argument is addressed below in Section II.d.

B. The FDCPA Definition of the Term "Officers" Is, At Least, Ambiguous

The clear-statement rule is one "of statutory interpretation, to be relied upon only when the terms of a statute allow." *See United States v. Lopez*, 514 U.S. 549, 611 (1995); *see also United States v. Culbert*, 435 U.S. 371, 379–380 (1978); *Gregory v. Ashcroft*, *supra*; *United States v. Bass*, *supra*, 404 U.S., at 346–347, 92 S.Ct., at 521–522. *Gregory* stated:

> [W]e are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly. Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

See Gregory, *supra* at 467.

Here, special counsel are clearly officers of the State of Ohio according to the Dictionary Act definition of the term. For the sake of argument though, even if it is ambiguous as to whether special counsel are "officers," this only bolsters the argument for application of the clear-statement rule, as Congress' intentions are not "unmistakably clear in the language of the statute.'" *See Gregory*, *supra* at 453. Indeed, Plaintiff-Respondents have even conceded

that this term is "ambiguous" and "open to multiple[] yet reasonable interpretations." *See* Respondents' Reply Brief to Appellees' Principal Briefs at 5, Doc. 38, Page ID #12. This admission should be the end of the case, as *Gregory* requires that when Congress purports to regulate core state functions (of which collecting State debts is one), it must do so unambiguously. *Gregory*, 501 U.S. at 470. As stated in the dissenting 6th Circuit opinion:

> [t]he *Gregory* clear-statement admonition bars courts from construing ambiguous federal statutes to "trench on the States' arrangements for conducting their own governments." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). The States' sovereign authority gives them power to structure their legal departments as they please, and their "varied" and "pragmatic" approaches have produced a "staggering[ly] divers[e]" array of governance arrangements. *Avery v. Midland Cnty.*, 390 U.S. 474, 482-83 (1968).

See OAG Pet.App.58a. The Plaintiff-Respondents inability to state "that the statute is unambiguous in their favor" (Respondents' Reply Brief to Appellees' Principal Briefs at 5, Doc. 38, Page ID #12) means that the term "officer" does include special counsel in this case. *See Gregory*, *supra* at 467.

The 6th Circuit decision attempts to sidestep this entire argument by claiming that "Ohio is not being regulated; nor is the structure of its government being challenged." *See* OAG Pet.App.39a. As seen below, this statement is both incorrect and irrelevant.

It is incorrect because the collection of debt is considered a core sovereign activity. It is irrelevant because the application of the clear-statement rule has never been limited to laws that "regulate" a State or where the "structure of its government is challenged."

C. Failure to Apply the Clear Statement Rule Trenches on the States' Arrangement for Conducting Their Own Government

The understanding in *Gregory* is based upon the fact that "[t]he Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *See Gregory, supra* at 457 citing to U.S. Const., Amend. 10. "Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Federal statutes "cannot be construed without regard to the implications of our dual system of government." James Madison correctly defined the advantages of such a system, stating:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of

> the people, and the internal order, improvement, and prosperity of the State.

See the *Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961). This "delicate balance" does allow the Federal Government to legislate in areas that are traditionally regulated by States. *See Gregory*, *supra* at 460. But because it is such an "extraordinary power," the court "must assume Congress does not exercise [it] lightly." *See Id.* Indeed, "[f]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *See Nixon v. Missouri Muni. League*, 541 U.S. 125, 140 (2004).

In this context, there are certain "fundamental state legislative prerogatives" through which a "state defines itself as a sovereign." *See Gregory*, *supra* at 460; *see also Lopez*, *supra* at 610. These prerogatives of a sovereign state have manifested themselves in many ways, including that debts owed to the state were "paid before the debts owed other creditors" (*see United States v. Moore*, 423 U.S. 77, 80 (1975)) and the common law tradition that debts owed to the state were not discharged in bankruptcy (*see Commonwealth v. Hutchinson*, 10 Pa. 466, 467-68. (Pa. 1849); *People v. Herkimer*, 4 Cow. 345, 346-67 (N.Y. Sup.Ct. 1825)). Indeed, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts

due to the crown " *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856).

Here, Ohio's prerogative to choose special counsel over a given State employee is no less the prerogative of the State than the option to choose between state and local employees. *See City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002). As government "is the science of experiment a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). Specifically, the Attorney General has had (and exercised) the authority to hire special counsel longer than the office has had the authority to hire employees. *See* 97 Ohio Laws at 60, *compare with* 107 Ohio Laws at 504.

As the exercise of this State prerogative, the OAG correctly found that special counsel are "authorized by law" and therefore an officer of the State. The 6th Circuit concluded that such a reading of the definition of the term "officer" in the Dictionary Act "would invite a preposterous result," where "every independent contractor working on behalf of a state" would be "bestow[ed] officer status under the Dictionary Act." *See* OAG Pet.App.33a-34a.

To prove this point, the 6th Circuit looked to the Ohio Facilities Construction Commission and its Executive Director, which are responsible for "general supervision over the construction of any projects, improvements, or public buildings constructed for a state agency." *See* Ohio Rev. Code § 123.21(2). Under that example, the 6th Circuit found that all

independent contractors hired by the Executive Director for work on construction projects would be officers of the State. But this analogy is flawed. An attorney appointed as special counsel is an "officer" of the State because she is responsible for enforcing Ohio's civil code as it relates to debts owed to the State. *See* O.R.C. § 109.08. The power to enforce the civil code is a quintessential function of the State. *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Pico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994). Even if special counsel are considered independent contractors for some purposes, the ability to enforce the State's civil code is the distinction that makes special counsel different than any other party that simply contracts with the State. As the dissenting 6th Circuit opinion pointed out:

> The Ohio Facilities Construction Commission, cited by the majority in support of [respondent]s' view, proves the point: There is nothing "sovereign" about the power to "construct[ ] and repair" a state agency's buildings, Ohio Rev. Code § 123.21, and sovereign power remains a precondition of officer status.

See OAG Pet.App.63a (emphasis added). Special counsel's sovereign power to enforce the civil code separates it from the "preposterous result" that is contemplated by the 6th Circuit. Accordingly, special counsel should be afforded the protection afforded by the FDCPA's officer exemption.

D. Respondent Jones LLC Cannot Be Held Liable for Respondent Jones' Acts If Respondent Jones Is Exempt from the FDCPA

The 6th Circuits decision makes numerous references to the fact that the position of special counsel is "personal in nature." *See* OAG Pet.App.24a & 52a. While this may be true, it is not dispositive regarding the liability of Respondent Jones LLC. "Although the FDCPA does not expressly address vicarious liability, courts have held that vicarious liability may obtain where both parties are debt collectors." *Freeman v. ABC Legal Services, Inc.*, 827 F.Supp.2d 1065, 1076 (N.D. Cal. 2011) (emphasis added), *citing Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 108 (6th Cir. 1996); *see also Breidenbach v. Experian*, No. 3:12-cv-1548-GPC-BLM, 2013 WL 1010565, *3 (S.D. Cal. Mar. 13, 2013) ("vicarious liability may only be imposed if both the principal and the agent are debt collector as defined by the FDCPA").

By naming Jones LLC as a defendant in this case, Respondents attempted to circumvent Jones' official state position by attaching liability to Jones LLC for actions Jones took in his capacity as special counsel. Respondents acknowledge that the alleged violations were committed by Jones "in his role as 'special counsel' to the Ohio Attorney General." (Complaint, Doc.1, Page ID#1-20), at ¶ 43). As discussed previously, Respondent Jones is not a debt collector under the FDCPA when acting in his role as special counsel to the OAG. Accordingly, Respondent Jones LLC cannot be held vicariously liable for Jones' acts since he is not a debt collector.

III. THE COMMUNICATIONS WERE NOT FALSE OR MISLEADING UNDER 15 U.S.C. § 1692e

Even if the FDCPA could somehow be stretched to cover the actions of special counsel in this case, Plaintiff-Respondents are unable to show that there was a violation of the FDCPA.[5] Respondents have claimed that the letters sent to them violated §§ 1692e(9) ("use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval") and 1692e(14) ("[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization."). Despite the fact that there is a circuit split regarding the general liability standard for debt collector communications,[6] the 6th Circuit used the "least

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[5] It should be noted that recent case law from this Court found that the government's regulation of speech is content based, and therefore subject to strict scrutiny, when the regulation makes "facial distinctions based on a message" such as speech that is "regulated by particular subject matter" or by "particular subject matter." *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (June 18, 2015). Because the FDCPA cannot be "justified without reference to the content of the regulated speech," it is subject to strict scrutiny as it relates to the First Amendment to the Constitution. *See Id.* at 2226.

[6] Some courts have analyzed communications from the perspective of an "unsophisticated consumer" *See Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 317-18 (8th Cir. 2004); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259-60 (7th Cir. 1994) (Easterbrook, J., concurring). While others have made use of the "least sophisticated consumer" test correct. *See*

sophisticated consumer" standard. *See* OAG Pet.App.48a. The 6th Circuit provides a standard that is hardly exact and appears to create more questions than it answers, proving the consequences when courts interpret the "least sophisticated consumer" test in order to reach consumers on "the very last rung on the sophistication ladder." *Gammon*, 27 F.3d at 1257 Despite the lack of clarity in the standard provided by the 6th Circuit, special counsel's use of the OAG's letterhead did not violate the actual language of the FDCPA, and the 6th Circuit's decision should be overruled.

A. Failure to Show a Violation of 15 U.S.C. § 1692e(9) or (14)

The Sixth Circuit first stated that the subject collection letters "violated [the FDCPA] in the technical sense" because "Mike DeWine is not the true name of any Defendants" and "the official letterhead certainly implied that the letter was issued by the OAG." *See* OAG Pet.App.48a. Although the Sixth Circuit did not indicate that these technical violations were necessarily "material," it does indicate the Court's misunderstanding of the facts of this case. Mike DeWine may not be a Defendant in this case, but the letters in this case were issued by

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Lesher v. Law Offices of Mitchell N. Kay, PC, 650 F.3d 993, 1002-03 (3d Cir. 2011); *Pettit v. Retrieval Masters Creditor Bur., Inc.*, 211 F.3d 1057, 1060 (7th Cir. 2000) ("we have rejected the 'least sophisticated debtor' standard used by some other circuits"). Another circuit has called such a difference "de minimis" but the distinction between such tests becomes obvious when examined in a more specific context. *Peter v. GC Servs. L.P.*, 310 F.3d 344, 348 n.1 (5th Cir. 2002).

special counsel as a direct result of the Attorney General conferring the authority of the State of Ohio. It is immaterial that the letter was actually sent by special counsel, as the letters were sent at the express direction of the OAG.

But the court's factual misunderstanding does not end here. The 6th Circuit opinion continues, stating "[t]he presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." This is exactly the point. The State of Ohio is taking action against her. Instead of seeing this action for what it is, the 6th Circuit opinion claims that the sole purpose in using the OAG letterhead is "intimidation." *See* OAG Pet.App.45a. Additionally, the 6th Circuit found that "there was also some indication that the attorney's role as a debt collector was separate and apart from the OAG." *See* OAG Pet.App.49a. Lastly, the 6th Circuit found that a jury could reasonably find that special counsel's use of the OAG's letterhead violates 15 U.S.C. § 1692e(14). *See* OAG Pet.App.51a

When Jones is operating in his official capacity as special counsel, he may mention several "true names"–his own name, that of the OAG to whom he has been appointed to serve, and that of his private business which provides him with office space. In fact, the use of multiple names is consistent with the FDCPA so long as that name "does not misrepresent his identity or deceive the consumer." *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988).

In this context, it is logical that the letter would appear on OAG letterhead, contain Jones' individual name and position with the OAG in the signature block, and provide the name and address (the LLC) where the debtor can obtain more information and send payment. This is no different than how a letter from an in-house Assistant OAG "employee" might appear–the individual writing the letter would use OAG letterhead, list his own name and position with the OAG, and direct the debtor where to send payment. No one would argue that the in-house Assistant OAG employee was not using his "true name" when he used OAG letterhead.

Instead, the 6th circuit found that because Jones' contract designates him an independent contractor for compensation purposes, he is not entitled to the same affiliation. But Ohio statutes clearly dictate that Jones is appointed by the OAG pursuant to statute (O.R.C. § 109.08), and that, whether "appointed *or* employed," Jones is a "civil servant" of the state when he is acting as special counsel (O.R.C. § 124.11(A)(11)). *See also Berridge v. Heiser*, 993 F.Supp. 1136, 1140 & 1143-44 (S.D. Ohio 1997) (special counsel for the OAG, appointed under O.R.C. 109.08, treated as a public official); *Solowitch*, 8 Ohio App.3d at 117-118 (deputy registrar treated as state officer despite contractual nature of relationship). In other words, for purposes of the statutory duties he carries out as special counsel, Jones is just as much affiliated with the OAG as an in-house employee is.

Special counsel's use of the OAG's letterhead did not violate the FDCPA. In *Heredia v. Green*, 667

F.2d 392, 395 (3rd Cir. 1981), discussed above, the defendant sent notices to tenants, which contained the municipal court's seal and the words "Landlord & Tenant Officers of Municipal Court." *Id.* at 393. Similar to the instant case, the notices demanded payment at the defendant's personal office. *Id.* The municipal court "specifically authorized" the defendant to use the notice at issue. *Id.* at 395. The Third Circuit found such notices to be lawful. As the court noted, the notice's legitimate purpose was "to impress upon tenants that the municipal court is involved, to assure the tenant's attention and prompt response, and to explain clearly [the consequences]." *Id.* at 396.

Likewise here, special counsel are appointed by the OAG pursuant to statute. The OAG not only authorizes, but requires special counsel to use the OAG's letterhead. If Jones failed to use the OAG's letterhead, he would not only violate the orders of the OAG he was appointed to serve (Complaint, Doc.1, Page ID# 1-20, at ¶ 7), but he would fail to serve the governmental interests he was appointed to protect. As in *Heredia*, failure to use the OAG's letterhead would give the debtors a false impression, as this would not impress upon debtors the OAG's involvement in collecting their debts.

In *Gradisher v. Check Enforcement Unit, Inc.*, 210 F.Supp.2d 907 (W.D. Mich. 2002), the defendant (CEU) entered into a contract with the County of Muskegon to provide services for the recovery of dishonored checks. *Id.* at 910. In providing these services, CEU sent notices to debtors using the letterhead and envelopes of the county sheriff's office,

which were supplied by the sheriff's office. *Id.* However, the sheriff's department neither oversaw nor supervised CEU's activities. *Id.* One of these debtors sued CEU under sections 1692e(1), (9), and (14). *Id.* at 914. In holding for the plaintiff, the court reasoned that even though CEU was affiliated with the Sheriff's Department, the notices violated sections 1692e(9) and e(14), though not e(1):

> [The notices] all conveyed the impression that they were authorized, created, and sent by the Sheriff's Department without any indication that CEU, an independent contractor of the County, was actually the entity that generated the notices. This result was accomplished both by using Sheriff's Department letterhead and by omitting any reference to CEU.

Id. (emphasis added). In other words, the court in *Gradisher* found a violation not because CEU used Sheriff's Department letterhead, but because CEU did so without revealing its own role in the creation of the letters. *Id.*

That simply is not the case here. In fact, the 6th Circuit and Plaintiffs-Respondents in this case appear to advocate the exact activity that resulted in the violations in *Gradisher*. Additionally, unlike in *Gradisher*, special counsel not only have a contractual relationship with the OAG, but are actually appointed, by statute. Special counsel are unclassified civil servants, not simply outside contractors. *See* O.R.C. § 124.11(A)(11). Moreover, unlike *Gradisher*, Jones clearly identified his and his law firm's role–he used his law office's return

address on the envelope, signed his name to the letter, and referred to himself, truthfully, as "outside counsel" to the OAG. The only reference to the OAG was in the letterhead, which the OAG not only supplied, but required Jones to use. One court in the 6th Circuit recently distinguished *Gradisher* for similar reasons. *See Golem v. Palisades Acquisition XVI, LLC*, No. 1:11CV02591, 2012 WL 2995480, *3 (N.D. Ohio July 23, 2012) (rejecting claim that law firm's use of caption stating "Berea Municipal Court" was misleading, because the document indicated it was sent by and directed questions to the law firm).

Simply put, then, there is nothing misleading in Jones' use of his own name, his firm's name, and the OAG's letterhead in his letter to Gillie. To allege that special counsel like Jones cannot mention all three names is disingenuous. If Jones had placed the OAG's name and address on the envelope and in the signature line of the letter, Appellants undoubtedly would have alleged a violation on facts very similar to those in *Gradisher* (though they still would have to address the obvious distinction that the defendants in *Gradisher* were not appointed by statute to official positions). If Jones did not use the OAG's letterhead, as required by the OAG, he also would not be truthfully representing the primary party interested in the collection of the debt. Indeed, the use of these names actually serves to clarify exactly who Jones is (outside counsel for the OAG), for whom he works and is affiliated (the OAG), and to whom Gillie was to send her payment (Jones' law office). Failure to use the OAG's letterhead would place the Respondents under the misapprehension that the OAG was not involved.

Not only was nothing in the Jones letter false, but it was certainly not materially misleading. To show a material misrepresentation, a plaintiff must identify how they relied on the misleading statement. In *Wallace v. Washington Mut. Bank, F.A.*, the Sixth Circuit explained that the misidentification of the creditor in that case could be misleading because the plaintiff alleged it actually caused "confusion and delay in trying to contact the proper party concerning payment." 683 F.3d 323, 327 (6th Cir. 2012). In this case, the letter specifically identified whom Gillie should call concerning payment and where to direct payment.

The 6th Circuit analysis incorrectly stated that the State, and thus any party acting as special counsel on behalf of the State had no "special authority that a regular creditor does not." *See* OAG Pet.App.45a. But the State of Ohio has many authorities that are not granted to a private debt collector after receiving judgment. These include the right to apply a debtor's income-tax refund in satisfaction of a debt (*see* O.R.C. § 5747.12), statutes of limitation do not run against the State unless they expressly say so (*see Ohio Dep't of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140 (1988); O.R.C. § 2329.07(A)), receipt of priority in probate (*see* O.R.C. § 2117.25(A)(8), and required use of lottery prizes exceeding $5,000 to pay debts certified to the Attorney General (*see* O.R.C. § 3770.073(A)).

The Sixth Circuit Opinion in this case only adds to the confusion, finding that "[t]he presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State

of Ohio that is threatening to take action against her" (*See* OAG Pet.App.49a), and that "[u]se of the letterhead, in our view, is intended to induce a higher rate of repayment by intimating that the State of Ohio is in fact sending the letter." *See Id.* at 34a. But only a bizarre and idiosyncratic understanding of the letter could bring a reader to these conclusions because "special counsel are the Attorney General's agents, authorized to stand in his place when collecting Ohio debts." *See Id.* at 63a. As these are debts that are owed to the State and special counsel are working on behalf of the Attorney General, "[n]ot even the least sophisticated consumer could infer anything from these letters other than the reality that these were indeed state debts." *Id.* at 54a (Sutton, J., dissenting).

The alleged misrepresentation in this case, who actually prepared the letter, is immaterial. Whether or not special counsel are exempt from the FDCPA, their relationship with the Attorney General under Ohio law enables them to represent themselves as arms of the Attorney General's office. Because Jones' use of the OAG's letterhead was neither false nor materially misleading, and because the letters in this case are not subject to more than one reasonable interpretation, the District Court properly granted summary judgment in favor of Appellees Jones and Jones LLC, and the 6th Circuit's decision should be overruled.

CONCLUSION

Accordingly, the decision of the 6th Circuit Court of Appeals should be reversed and the District court should be directed to enter summary judgment in favor of the Petitioners and Jones Respondents.

Respectfully submitted,

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